

**Response to Comments/ Notice of Determination
on the
Tennessee Draft General Permit No. TNR10-0000
Storm Water Discharges from Construction Activities
June 27, 2000**

I. Administrative Record

This Notice of Determination sets forth the Division's responses to comments on the draft NPDES general permit for storm water discharges from construction sites.

On February 16, 1999, the Department of Environment and Conservation/Division of Water Pollution Control gave notice of a proposed NPDES general permit for storm water discharges from construction activities. The Division held five public hearings and received written comments through April 5, 1999. The draft permit was revised and placed on public notice on December 13, 1999. Following three informational meetings, a public hearing was held on February 11, 2000.

At the hearing on February 11th, two persons requested to testify and did so. In the following two weeks, the Division received 10 letters of comment, from federal and state agencies, TVA, environmental interest spokespersons, and from a land development interest.

II. Purpose of this Addendum to Rationale/Response to Comments

This addendum addresses and responds to comments on several main issues of the permit.

Certain other comments and suggestions would improve the permit, and we have incorporated them into the permit but not listed them in this response document. A color-coded version of this permit is available that shows all the revisions from the draft permit of December 13, 1999.

III. Major Comments and Responses

Subject a: "Bad actors" list

Comments: At least two commenters suggested that the Division implement more restrictive permit procedures and requirements for operators who have a history of noncompliance with the construction activity storm water runoff permit (this permit); and/or that the permit exempt operators with an exemplary record of compliance under the permit from various paperwork requirements of the permit.

Response: To establish a list of noncompliers and compliers, regardless of how carefully this list were determined, and then to administer different permit conditions based on the list, is not a workable option for the Division. Though a simple concept, at the present time, it presents complications in tracking compliance for hundreds of permittees. We would rather apply the same permit conditions to each site as much as possible.

Subject b: Construction disturbances of less than five acres

Comments: One commenter questioned why this permit is not planned to be used as a permit to cover construction sites disturbing less than five acres of land.

Response: The wording of this permit does allow for the Division Director to employ this permit for construction activity smaller than five acres.

However, EPA rules allow the Division various options (lesser notification requirements, local government permitting) for permitting sites less than five acres, and the Division may chose, prior to March of 2003, to use such other mechanisms.

Subject c: Permittee-required site inspections

Comment: There were two comments that the schedule of inspections mandated under the special monitoring and reporting requirements (for discharges into impaired waterbodies) were problematic or excessive. For instance, what probability of rain defines an "anticipated" rainfall event, and what sort of action from the permittee is expected if a weather forecast changes over the weekend when staff are not on site. One person commented that inspections once-per-two weeks is sufficient, when in combination with inspections before anticipated rain events and immediately after rain events of 0.5 inches or more. Similarly, if controls are inspected and repaired on Tuesday and then a weather report Tuesday evening indicates probability of rain on Wednesday, does the Tuesday inspection meet the requirement for an inspection prior to an anticipated storm event.

Response: The once-per-week inspection requirement was the significant aspect of the Division's response to previous comments on protections for impaired waters. This once-per-week requirement replaces sampling of stream and discharge. Frequent inspections and maintenance are critical, and it is not an option for us to reduce this to once every two weeks.

One should note that inspections prior to a rain event or after a rain event fulfill the once-per-week inspection requirement. Acknowledging that having persons on call during weekend hours both to monitor weather forecasts and to inspect can be burdensome, we will change the requirement of this section slightly to say that inspections and associated, necessary repairs done 48 hours before a rain event qualify as "prior to an anticipated storm event," and that inspections and repairs on Friday meet the requirement for "inspections prior to anticipated storm events" when rain is anticipated on the weekend, until normal working hours Monday morning.

Subject d: Limitations on general permit coverage/requiring individual permits

Comments: Several commenters address this subject. One commenter states that the permit does not set forth methods, thresholds, or criteria by which to determine whether a discharge will cause, or is causing, a violation of water quality standards, or is contributing to the impairment of a 303(d) listed water. The commenter is concerned that varying, inconsistent procedures will be followed to make such a determination. Other persons comment that there are inadequate criteria in the permit for requiring individual permits. At least two persons believe that there should be a way to say "no," prior to construction, where a stream is in violation of water quality standards. One person identified urban sprawl as a source of water quality problems. One commented that the permit needs to ban general permit coverage where a discharge contributes to stream impairment or would have a negative impact on rare species. At least two commenters proposed that there be an upper limit on the size of a disturbed area allowed to be covered under this permit, for instance, 100 acres, and this will allow more involvement of the State inspectors and field personnel.

Response: The Division agrees that the permit does not include methods, thresholds or criteria by which to determine whether or not a particular discharge is causing a violation of water quality or whether a discharge is contributing to impairment of a waterbody. In response, we note that the Division of Water Pollution Control follows a well-established set of protocols to assess water quality and impairment of streams. These assessments are an essential part of the Division's mission and involve the considerable experience of

Department staff and review by management. On this point, we note also the permit requires the Division give a written explanation of the reason any time it requires an individual permit of a construction activity that otherwise is covered or could be covered under this general permit. See Part VII.L.

Concerning the comment about inadequate criteria for requiring general permits, we present below those parts of the permit that address this subject.

Excluded from general permit coverage are the following (individual permits also do not authorize such discharges) - references are to sections in the permit:

- I.C.4. Discharges that the Director determines will cause, or have the reasonable potential to cause violations of water quality standards; and
- I.C.5. Discharges that are causing or contributing to the impairment of a Section 303(d) listed water.

Further, with respect to a discharge already permitted under the general permit which the Division determines is contributing to impairment of a waterbody, the permit states:

- III.F.4. If the Division finds that a discharge is causing a violation of water quality standards or causing or contributing to the impairment of a 303(d) listed water, and finds that the discharger is in compliance with storm water pollution prevention plan requirements (see Part IV.), the discharger will be notified by the Director in writing that the discharge is no longer eligible for coverage under the general permit and that continued discharges must be covered by an individual permit. To obtain the individual permit, the operator must file an individual permit application.

In another location, Part VII.A., "Duty to Comply," the permit provides that noncompliance constitutes a violation of CWA and is grounds for enforcement action, for termination of permit coverage, or for denial of a permit renewal application. Thus, the State can terminate permit coverage for an activity in violation of permit conditions.

The provisions I.C.5. and III.F.4. are clearer than previous, similar provisions in our general permits. Previous permits were not clear on whether or not the Division must initiate the individual permit process when a discharge was found to be causing impairment of water quality. Under these new provisions, except where the detrimental impacts are the result of failure to implement a storm water pollution prevention plan in compliance with the permit (in which case the Division would initiate enforcement actions under the general permit), the individual permit process is a necessity.

One commenter asked, "how many individual permits have been required for discharges from construction sites." As far as we know, there have been no individual permits required at construction sites since 1992.

Subject e: Halting construction (a "stop-work" order) at a site where discharges are causing water quality violations

Comment: Part VII.C. of the permit, which deals with halting the permitted activity, needs to be expanded and strengthened. The commenter also asks whether or not a project has ever been made to cease.

Response: This section of the permit, quoted below, is a standard provision in NDPES permits on halting a permitted activity.

It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

This provision does not give the State the authority to order an activity to cease. It deals with a situation where the State is taking an enforcement action against a discharger.

The Division will not change this standard language and in fact cannot revise the permit to enable stop-work orders. The State Water Quality Control Act does not give the Division authority to direct a discharger to stop his activities. However, as noted in response to the previous comment, the permit may be terminated where a permittee is in violation of conditions.

Subject f: Identification of 303(d)-listed (or impaired) waters

Comment: There were at least three comments or questions presented with respect to identification of impaired waters, for the purpose of this permit. One comment is that there are streams presently impaired because of siltation that were not impaired, or not identified as impaired, at the time the last 303(d) list was published (1998). These streams should be protected with special protections. More than one commenter questioned how the boundaries of a watershed are to be determined, in which construction will be subject to the permit's special requirements. At least one commenter states that the Division must make it clear to the public what are the impaired streams, preferably in a easy-to-view mapped format.

Response: When the Division processes Notices of Intent for coverage under this permit, we will consider the most recent information on whether or not waters are impaired and will decide accordingly whether or not there is reasonable potential that the permittee's discharges will contribute to impairment of an already impaired water. The permittee will be informed of this decision. The Division will re-word the language that describes which construction sites will be subject to the special requirements of the permit in subpart III.F. If a discharge enters waters impaired by siltation, or is upstream of waters impaired by siltation and may affect the impaired waters, then the discharges will be subject to the special permit requirements.

The Division has been striving to make the 303(d) list more user-friendly and available. This is an ongoing effort, separate from this permit.

Subject g: Effective date of coverage under the general permit

Comment: Two or three persons supported the Division's proposal that coverage under this permit become effective only after the Division had processed an NOI and prepared a Notice of Coverage. On the other hand, at least two commenters opposed this provision. They commented that this proposal introduces uncertainty into when a permit will be issued and the potential for delays if WPC staff are busy with other responsibilities at the time. One or more commenters believe that a late NOI should not be eligible for coverage under a general permit.

Response: The Division believes that it can process NOIs in a timely fashion. TDEC Environmental Assistance Centers will be processing most NOIs, dividing the workload that has been processed in the central office of the Division of Water Pollution Control. Based the present rate of NOIs received, EACs will have less than five NOIs per week to process.

As a backup provision, the permit will allow an applicant who has submitted a complete NOI to become permitted 30 days after the Division receives the NOI if the NOI has been assigned a valid permit number and the permittee is informed of this number.

To deny permit coverage where an NOI is submitted late is not a workable option for the Division. This means that if many NOIs were received late, the Division would be faced with issuing many individual permits that it could not process within a reasonable amount of time.

Subject h: Special provisions to protect impaired waters

Comment: Four commenters disapproved of replacing stream and discharge monitoring with an inspection report for BMPs and erosion and sediment controls and outfall/receiving streams. They believed that this was not adequate, especially because without numerical sampling results, there is no sure way to ascertain whether or not runoff from a construction activity is contributing additional (to pre-existing site conditions) loading to a stream. One commenter referred to the NPDES rules at 40 CFR 122.4, stating that this general permit should adhere to the NPDES rules that prohibit the agency from allowing/permitting additional loading of a pollutant into impaired waters.

Persons commented that the permit should not allow coverage for discharges to 303(d)-listed waters, or if this is allowed, to incorporate numerical limits for parameters such as total suspended solids, turbidity and settleable solids. Acknowledging the difficult nature of placing limits on the highly variable nature of storm water discharges, one suggested employing "soft" limits, or a range of limits. At least two commenters recommended that permittees be required to perform digital, dated photography of site discharges and erosion and sediment controls, which would be made available to State inspectors and the public.

At least two commenters supported replacing stream and discharge monitoring with the inspection reporting mechanism.

Response: The Division has been presented numerous ways that this permit could be constructed to protect impaired waters. We are electing to impose the more rigorous site inspection, outfall inspection, and reporting requirements, along with a provision that an individual permit will be required for discharges known to be contributing to impairment, where operator is in compliance with storm water pollution prevention plan requirements.

Photographs taken by a permittee cannot be used by the Division in enforcement actions, and otherwise would be of little value to the Division in official actions. The Division has to make its own observations for enforcement purposes. Accordingly, we will not require permittees to take photographs of their sites.

Subject i: Monitoring of discharges and receiving streams

Comment: Three commenters believed the permit should include monitoring of discharges from all sites permitted, not only the ones with discharges into impaired waters. They believe that the permit needs measurable and enforceable standards for discharges and that the visual reporting does not provide adequate records and does not address quality of discharges.

Response: The Division disagrees that numerical limits are needed in this permit. We believe it is sufficient to require best management practices and that if erosion and sediment controls are placed and maintained on a site, discharges will not cause harm to receiving waters.

Subject j: Threatened and Endangered Species Review and Protections

Comment: Persons expressed support for the State's plan to perform reviews for protected species, and that notices of coverage would not be issued until the State has performed such a review. Some commenters believed, however, that the review should include all fauna and flora in the vicinity of the project, not only aquatic fauna. Persons requested that there be special protections for sinking streams and for discharges that might enter underground waters, particularly in karst terrain, and that the species review include cave-dwelling species in these areas. There was also some comment on the spatial extent of the review. For instance, one commenter believed that boundaries 1 mile around the site and 4 miles downstream were arbitrary and that the reviewer should consider presence or probability of available habitat.

One commenter suggested that if special permit conditions are needed to protect wildlife, the Division should be able to accomplish this through special conditions appended to the general permit, rather than with an individual permit. Another commenter believed that the 30-day lead time for processing NOIs may not be a long enough time to assess a project for permitting, where special protections for threatened and endangered species are required.

One commenter pointed out that the Division's own Natural Resources Section already performs protected-species reviews for construction projects and that it is unnecessary for an additional, possibly different, review as a part of this permit.

Response: Permit language will refer to aquatic fauna. Protecting other wildlife would be, for the most part, outside the boundaries of the NPDES program, which addresses discharges into waters of the U.S. When the Division reviews a project for possible presence of threatened and endangered species near or downstream from a construction site, we can take into account the likelihood of impact to such species and will not be limited to certain boundaries or only to aquatic fauna.

The permit makes provision in section IV.B.3., for the Director of the Division of Water Pollution Control to require changes to a permittee's storm water pollution prevention plan. We will include language in the permit that specifically enables us to introduce changes to a permittee's pollution prevention plan for the purpose of protecting rare species.

Subject k: Who must obtain the NPDES permit

Comment: Two or three persons asked the Division to clarify who must obtain coverage under this permit and who must sign an NOI. One person asked whether or not home-builders are required to obtain coverage under the permit after a developer has sold all lots and is no longer active on the construction site.

Response: Persons defined as operators are required to obtain coverage under this permit, and the term "operator" is defined in the permit. The Division will not elaborate on this term or on this question in the permit itself. We have provided guidance in the Rationale Sheet, dated February, 1999, and as necessary we will provide guidance after the permit is issued. The Rationale Sheet gives an explanation of when homebuilders would be required to obtain this permit. Whether or not homebuilders are required to obtain the permit depends primarily on the choice of the builders and developer.

The NOI form (Appendix A of the Permit) is designed so that both a developer and its construction contractors sign the same NOI form to be submitted to the Department. This

simplifies our recordkeeping. However, the permit allows the contractor, who is not identified at the time an NOI is submitted, to submit a separate NOI.

The Division does not intend that contractors of various specialty work and contractors that have no control over installation and maintenance of erosion and sediment controls become permittees under this permit.

Subject l: "Grandfathering" of construction activities presently permitted under the Tennessee Multi-Sector General Permit (TMSP)

Comment: Several parties commented that already-permitted sites should not be required to reapply for a new permit. They were concerned about having to file NOIs again and the fact that contracts and erosion and sediment control plans had been prepared according to previously existing and existing erosion and sediment control requirements (Rule 1200-4-10-.05 and the Tennessee Erosion and Sediment Control Handbook).

One party questioned whether sites now permitted under the TMSP were being required to perform discharge sampling as required in Sector AD of the TMSP.

Response: The Division will set up a procedure to transfer present permittees under the construction storm water general permit or under the TMSP to coverage under this new permit. Sector AD of the TMSP requires discharge sampling (without limits). This was intended as a temporary means of permitting construction sites after the previous permit rule expired, and the Division did not intend that sites have to perform sampling of construction site runoff.

The Division will notify permittees that this new permit is issued and will encourage them to switch to the new permit but will give them the option to remain covered under the TMSP. Under the new permit, these projects will be subject to provisions of the previous rule 1200-4-10-.05 until December 31, 2001, except that monitoring and reporting requirements for projects discharging to impaired waters will become effective January 1, 2001. The Division may shorten these time frames on individual projects by written notice to permittees.

Subject m: Involvement of citizens in the permitting and compliance process

Comment: Several comments requested the Division provide for greater involvement of citizens in granting permits and enforcement of the permit. For instance, one commenter requested that NOIs be put on public notice. Another commented that adjacent property owners should be informed that a development was proposed nearby. One commented that citizens should be enabled to take legal action against violators of the permit.

Response: This permit will not set new policies on these matters. NOIs will not be put on public notice, but the Division will work to post its record of NOIs on its internet web site. The Division is willing to consider discussion on how to make this permit more effective through involvement of citizens. It is possible to modify the permit if there is agreement on changes to enable more citizen involvement.

Subject n: Miscellaneous technical points of the permit requirements

Comments were made on various details of the permit. These are tabulated below in a brief format with a brief indication of our response. One can see the color-coded version of the final permit for more detail as to the changes made.

- **Include streamside buffer zones as a requirement of the permit.**

The Division does not have the right to make this a mandatory requirement for every construction site, and does not have the resources to review and approve exceptions. We will include language in the permit encouraging streamside buffer zones. We will also work to encourage local governments to adopt this policy.

- **Require that silt fences be removed after completion of a project.**

Insofar as old silt fences contribute to continued discharge of sediment from a construction site, they must be removed.

- **Define “clearing.”**

Clearing is being defined in the permit.

- **Requiring inspections for 303(d) listed waters before anticipated storm events and after storm events and once per week is excessive.**

This requirement is being revised slightly to allow for time a site is unstaffed.

- **Permit does not, but should, include restrictions on alterations to flow, flood plain, or neighboring properties.**

This is addressed to some extent in IV.D.2.b.ii.

- **Include a requirement for dye tracing prior to issuance of permit, to protect groundwater supplies being used for drinking water.**

Addressing this possibility will be on a case-by-case basis.

- **Phasing requirements should be strengthened.**

No significant changes are being made.

- **Prohibit in-stream control devices.**

We have added language on this matter. See IV.D.2.a.iii.

- **Be more specific with respect to design criteria for controls.**

There are no major changes from the draft permit. The Department is working with University of Tennessee to establish training courses for construction site operators and inspectors.

- **Provide public easier access to SWPPP.**

We do not feel that we have authority in the permit to mandate that construction site operators provide copies of a SWPPP to the public. Many SWPPPs will have to be submitted to the Department and will therefore be available to the public at our offices.

- **Numbering of permittees**

The Division will number permittees as follows.

<u>Office</u>	<u>Permit numbers</u>
EAC-Chattanooga	TNR110001, TNR110002, etc.
EAC-Jackson	TNR120001, TNR120002, etc.
EAC-Knoxville	TNR130001, TNR130002, etc.
EAC-Nashville	TNR140001, TNR140002, etc.
EAC-Memphis	TNR150001, TNR150002, etc.
EAC-Johnson City	TNR160001, TNR160002, etc.
EAC-Cookeville	TNR170001, TNR170002, etc.
EAC-Columbia	TNR180001, TNR180002, etc.

TN represents Tennessee; R represents a storm water discharge general permit; 1 represents construction; the next digits 1-8 represent the code for the particular EAC.

Subject o: Fees for permit coverage

Comment: Several commenters questioned whether the Division had resources of personnel and expertise to regulate runoff from construction sites as needed. One commenter supported modest fees for permits.

Response: The Department and the Division of Water Pollution Control are participating in an effort to conduct training for developers, contractors and inspectors and is hoping to see the first training classes in the year 2000. The Division is proposing fees for construction permits. Division staff spend over one third of their time on construction-related activities. Such fees may be in place as early as the Fall of 2000.

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Division of Water Pollution Control

Date